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4 **UNITED STATES DISTRICT COURT**

5 EASTERN DISTRICT OF CALIFORNIA

6
7 JABORIE BROWN,

8 Petitioner,

9 v.

10 WARDEN OF U.S.P. ATWATER,

11 Respondent.

Case No. 1:20-cv-00233-SAB-HC

FINDINGS AND RECOMMENDATION TO
GRANT RESPONDENT'S MOTION TO
DISMISS AND DISMISS PETITION AND
SUPPLEMENTAL PETITIONS FOR WRIT
OF HABEAS CORPUS

(ECF Nos. 1, 14, 22, 23)

ORDER DIRECTING CLERK OF COURT
TO RANDOMLY ASSIGN DISTRICT
JUDGE

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15 Petitioner is a federal prisoner proceeding pro se with a petition for writ of habeas corpus
16 pursuant to 28 U.S.C. § 2241.

17 **I.**

18 **BACKGROUND**

19 Petitioner is currently incarcerated at the United States Penitentiary in Atwater,
20 California. (ECF No. 1 at 1).¹ Petitioner was convicted after a jury trial in the United States
21 District Court for the Southern District of Florida of, *inter alia*: attempt to possess with intent to
22 distribute cocaine, in violation of §§ 841(a)(1) and 846 (count 9); substantive Hobbs Act
23 robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (count 10); and possession of a firearm
24 during a crime of violence and a drug-trafficking crime, in violation of 18 U.S.C. §§ 924(c) and
25 2 (count 11). See In re Brown, No. 19-13413-D, 2019 U.S. App. LEXIS 27792, at *2 (11th Cir.
26 Sep. 13, 2019). On April 10, 2007, the Eleventh Circuit affirmed the judgment. United States v.
27 Brown, 227 F. App'x 795 (11th Cir. 2007), cert. denied, 552 U.S. 937 (2007).

28 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 On October 23, 2007, Petitioner filed his first § 2255 motion, which the United States
2 District Court for the Southern District of Florida denied on January 7, 2008. (App. 69–70).²
3 Subsequently, Petitioner filed numerous successive post-conviction challenges that were all
4 denied. See Brown, 2019 U.S. App. LEXIS 27792, at *2.

5 Petitioner applied to the Eleventh Circuit for leave to file a second or successive § 2255
6 motion based on United States v. Davis, 139 S. Ct. 2319 (2019). On September 13, 2019, the
7 Eleventh Circuit granted Petitioner’s application in part with respect to his § 924(o) conviction
8 (count 3). Brown, 2019 U.S. App. LEXIS 27792, at *2, 10. On October 29, 2019, Petitioner filed
9 his successive § 2255 motion in the United States District Court for the Southern District of
10 Florida. (ECF No. 13 at 3, 6).

11 On February 14, 2020, Petitioner filed the instant petition for writ of habeas corpus
12 pursuant to 28 U.S.C. § 2241, requesting that this Court vacate his conviction on count 11
13 because the substantive law changed such that the conduct of which Petitioner was convicted is
14 deemed not to be criminal. (ECF No. 1 at 6, 7). On September 30, 2020, Petitioner filed a
15 supplemental petition, which provided additional arguments in support of his original petition
16 and claim. (ECF No. 14).

17 On October 23, 2020, this Court granted Respondent’s motion to stay this proceeding
18 pending the resolution of Petitioner’s § 2255 motion in the Southern District of Florida. (ECF
19 No. 15). On December 3, 2020, Petitioner’s § 2255 motion was denied. (App. 88–96). Thus, on
20 December 29, 2020, the stay in this proceeding was lifted. (ECF No. 21).

21 On January 14, 2021, Petitioner filed another supplemental petition, which provided
22 additional arguments in support of his original petition and claim. (ECF No. 22). On February
23 18, 2021, Respondent filed a motion to dismiss the petition for lack of jurisdiction because
24 Petitioner fails to qualify for the escape hatch provision of § 2255. (ECF No. 23). To date, no
25 opposition or statement of non-opposition has been filed, and the time for doing so has passed.

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28 ² “App.” refers to the Appendix lodged by Respondent on February 18, 2021. (ECF No. 23-1). App. page numbers refer to the page numbers stamped at the bottom right corner.

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1 Here, Petitioner argues that because Hobbs Act robbery is not categorically a crime of
2 violence under the elements clause of § 924(c)(3)(A), Petitioner is actually innocent and his
3 conviction under 18 U.S.C. § 924(c) should be vacated. Section 924(c) proscribes a mandatory
4 consecutive imprisonment term for using or carrying a firearm “during and in relation to any
5 crime of violence or drug trafficking crime,” 18 U.S.C. § 924(c)(1)(A). The term “crime of
6 violence” is defined as “an offense that is a felony and—”

7 (A) has as an element the use, attempted use, or threatened use of physical force
8 against the person or property of another, or

9 (B) that by its nature, involves a substantial risk that physical force against the
10 person or property of another may be used in the course of committing the
11 offense.

12 18 U.S.C. § 924(c)(3). Clause (A) of this definition is known as the elements clause or force
13 clause, and clause (B) is known as the residual clause. United States v. Davis, 139 S. Ct. 2319,
14 2324 (2019); United States v. Watson, 881 F.3d 782, 784 (9th Cir. 2018) (per curiam), cert.
15 denied, 139 S. Ct. 203 (2018).

16 In United States v. Davis, 139 S. Ct. 2319 (2019), the Supreme Court held that 28 U.S.C.
17 § 924(c)(3)(B)—the residual clause—is unconstitutionally vague. Regardless, all the federal
18 courts of appeals have held that Hobbs Act robbery qualifies as a crime of violence under
19 § 924(c)(3)(A)’s elements clause. United States v. Dominguez, 954 F.3d 1251, 1260 (9th Cir.
20 2020) (“We previously held . . . that Hobbs Act robbery is a crime of violence under the
21 elements clause. We are in unanimous company. All of our sister circuits have considered this
22 question too, and have held that Hobbs Act robbery is a crime of violence under the elements
23 clause.” (citations omitted)); United States v. St. Hubert, 909 F.3d 335, 345 (11th Cir. 2018)
24 (“[T]his Court has already held that Hobbs Act robbery . . . independently qualifies as a crime of
25 violence under § 924(c)(3)(A)’s use-of-force clause.”), cert. denied, 139 S. Ct. 1394 (2019).

26 As Hobbs Act robbery qualifies as a crime of violence under § 924(c)(3)(A)’s elements
27 clause, Petitioner has not established a cognizable claim of actual innocence for purposes of
28 qualifying for the escape hatch. “[F]or Petitioner’s claim to be a legitimate § 2241 petition, he
must satisfy both . . . requirements.” Muth v. Fondren, 676 F.3d 815, 819 (9th Cir. 2012). As

1 Petitioner has not established a cognizable claim of actual innocence, this Court lacks
2 jurisdiction over the petition and supplemental petitions, and they should be dismissed.

3 **III.**

4 **RECOMMENDATION & ORDER**

5 Accordingly, the undersigned HEREBY RECOMMENDS that Respondent's motion to
6 dismiss (ECF No. 23) be GRANTED and the petition and supplemental petitions (ECF Nos. 1,
7 14, 22) be DISMISSED.

8 Further, the Clerk of Court is DIRECTED to randomly assign this action to a District
9 Judge.

10 This Findings and Recommendation is submitted to the assigned United States District
11 Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local
12 Rules of Practice for the United States District Court, Eastern District of California. Within
13 **THIRTY (30) days** after service of the Findings and Recommendation, any party may file
14 written objections with the court and serve a copy on all parties. Such a document should be
15 captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the
16 objections shall be served and filed within fourteen (14) days after service of the objections. The
17 assigned United States District Court Judge will then review the Magistrate Judge's ruling
18 pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within
19 the specified time may waive the right to appeal the District Court's order. Wilkerson v.
20 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th
21 Cir. 1991)).

22 IT IS SO ORDERED.

23 Dated: **June 1, 2021**

24 
25 UNITED STATES MAGISTRATE JUDGE
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